



APPEAL BRIEF

11/18/2005 DTESSEM1 00000025 10605873

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

November 16, 2005

In re application of : ANDERSON, Michael R.
Serial No. : 10/605,873
Filed : November 3, 2003
For : **DISPENSING CAPSULE FOR A LIQUID
CONTAINER**
Examiner : BUI, Luan Kim
Art Unit : 3728
Our File No. : 10008.3855

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant submits this Appeal Brief in triplicate as required by 37 C.F.R. § 41.37. A check in the amount of \$250.00 for the required fee pursuant to 37 C.F.R. §§ 41.37 and 1.17(f) for filing the brief is enclosed. A Notice of Appeal was filed on September 26, 2005. The Commissioner is authorized to charge any deficiency or credit any excess in these fees to Deposit Account No. 13-1130.

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REAL PARTY IN INTEREST

The real party in interest is Michael R. Anderson.

RELATED APPEALS AND INTERFERENCES

Appellant's attorney is not at this time aware of any related appeals and/or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

This is an appeal from the Examiner's final rejection of claims 1, 2, 3, 4, 5 and 6 dated June 1, 2005. Claims 1, 2, 3, 4, 5 and 6 are set forth in the Claims Appendix (A-1).

STATUS OF AMENDMENTS

No amendments have been submitted by Appellant subsequent to the Final Office Action of June 1, 2005.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 is an independent claim. Claims 2, 5 and 6 depend from claim 1. Claim 3 depends from claim 2.

The subject matter of independent claim 1 defines a capsule that can contain a liquid or dry ingredient. A capsule is inserted into any type liquid container including packs, bags, cans, plastic or glass bottles. With a bottle, as an example, the capsule is mounted within the neck or throat of the bottle having a conventional screw off cap, such as a bottle of water.

The capsule body has two separate parts, one of which is movable relative to the other one. The first body member has a top opening and a closed sealed bottom as described in Paragraph 0042. The second capsule body member has a closed top and an open bottom that includes a cutting element along the open bottom. The cutting element has first and second prongs as described in the specification in Paragraph 0043 and Paragraph 0044. When the first member is depressed against the second member, the sealed closed bottom of the first member will be cut open by the second member dispensing the ingredients into the liquid container. See Paragraph 0044.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. The first ground of rejection is whether or not the Examiner erred in finally rejecting claims 1, 2 and 4 under 35 U.S.C. 102(b) as being anticipated by English (1,774,258).

2. The second ground of rejection is whether or not the Examiner erred in finally rejecting claims 1, 2, 3 and 4 under 35 U.S.C. 103(a) as being unpatentable over Bowes, et al. (3,156,369) hereinafter "Bowes '369 in view of English (1,774,258).

3. The third ground of rejection is whether or not the Examiner erred in finally rejecting claim 5 under 35 U.S.C. 103(a) as being unpatentable over Bowes, et al. (3,156,369) and English (1,774,258) further in view of Rizzardi (5,038,951).

4. The fourth ground of rejection is whether or not the Examiner erred in finally rejecting claim 6 under 35 U.S.C. 103 as being unpatentable over Bowes, et al. '369, English '258 and further in view of Pittman (6,053,314).

ARGUMENT

First Ground of Rejection

The Examiner's rejection of claims 1, 2 and 4 under 35 U.S.C. 102(b) as being anticipated by English (1,774,258)(hereinafter "English '258) is erroneous. An anticipation rejection under 35 U.S.C. 102(b) requires that each and every element of the claimed invention be disclosed in a single prior art reference. In re Paulsen, 30 F.3d 1475, 31 U.S.P.Q.2d 1671 (Fed. Cir. 1994). The English reference does not contain each and every element of applicant's claimed invention. In the English '258 patent, the duplex capsule 1, shown in Figures 1 and 2, is made up of two telescoping sections 2 and 3 of cellophane and a separate partition 4 made of gelatin to prevent communication between the two ends of the container (capsule 1).

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For anticipation, there should be no difference between the claimed invention and the reference disclosure as viewed by a person of ordinary skill in the art. Scripps Clinic & Fes. Found. V. Genentech, Inc., 927 F.2d 1565, 18 U.S.P.Q.2d 1001 (Fed. Cir. 1991).

In Figures 3, 4 and 5, English '258 shows a modified form of the duplex capsule in which each inner section 9, 10 or 11 is provided with one, two or more pointed projections or cutters. The cutters penetrate partition 4 and as stated in English '258 in Column 2, lines 10-16: "the sections may then be turned relatively so as to cause the partition to be cut loose from its flange and thus permit the ingredients to be brought together." In the English '258 device, the first and second members are separated by a gelatinous wall 4. Member 9 has a pair of teeth to punctuate the gelatinous wall 4 allowing two materials to be mixed together, one in member 2 and the other in member 9.

The applicant's invention in claim 1 is completely different. The second member with the cutting edge tears open the sealed closed bottom of the first member allowing the entire contents to be released from the capsule completely. As best illustrated in applicant's Figure 1, the sealed bottom 12b is released and opened through the action of the second member 20 and a cutting edge 20a. The skirt or flange 5 in Figure 2 of English '258 or the gelatinous partition 4 shown in Figure 3 is not a capsule first member body or a capsule second member body as required in applicant's claim 1. Therefore, each and every element in the claimed invention in claims 1, 2 and 4 not shown in the English '258 reference cited by the Examiner. The Examiner's rejection is incorrect and should be reversed.

Second Ground of Rejection

The Examiner's rejection of claims 1-4 under 35 U.S.C. 103(a) as being unpatentable over Bowes '369 in view of English '258 is erroneous. The English '258 reference discloses in Figures 3, 4 and 5 capsule inner sections 9, 10 and 11 having one, two or more pointed projections or cutters 12 that can penetrate partition 4 at different points. Claim 1 of applicant's invention requires a "first prong" and a "second prong" disposed along the peripheral edge of the second body member and having a cutter edge disposed between said first prong and said second prong. Thus, it is applicant's position that even if a person of ordinary skill in the art combined Bowes, et al. '369 somehow with the English '258 device, one would not arrive at applicant's claimed invention. There is no teaching in English or Bowes, et al. to provide the cutting edge between the prongs or cutters. Although Figure 3 in Bowes, et al. '369 shows the flat bottom 16 in a lower position, it is clear in Bowes, et al. the bottom edge 29 of plunger 26 will separate the flat bottom 16 completely from cup 15. This cannot happen with applicant's specifically claimed invention in claim 1. Since claims 2, 3 and 4 depend from claim 1, it is applicant's position that claims 1 through 4 would not be obvious to one of ordinary skill in the art in view of the references cited by the Examiner and the Examiner's rejection must be incorrect and reversed.

Third Ground of Rejection

The Examiner's rejection of claim 5 under 35 U.S.C. 103 as being unpatentable over the references Bowes, et al. '369 and English '258 further in view of Rizzardi (5,038,951) is erroneous. Claim 5 requires, in addition to what has been pointed out above with respect to

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claim 1 that is not shown in either the references cited by the Examiner, a peripheral lip with apertures that extend radially outward from the first member top opening which allows one to drink the beverage through the aperture openings. The device in Rizzardi '951 is functionally completely different in purpose than the apertures claimed by applicant. In Rizzardi '951, cap 10 has a lower cylindrical section 11 that has connecting bridges 15 that are broken during the cap opening.

There must be something in the prior art as a whole to suggest the desirability and, thus, the obviousness of making the combination. C.R. Bard Inc. v. M3 Sys. Inc., 157 F.3d 1340, 48 U.S.P.Q.2d 1225 (Fed. Cir. 1998).

The mere fact that it is possible to find two isolated disclosures that might be combined in such a way as to produce a new compound does not necessarily render such production obvious unless the art contains something to suggest the proposed combinations. In re Grabiak, 769 F.2d 729, 226 U.S.P.Q. 870 (Fed. Cir. 1985).

The absence of a suggestion to combine is dispositive in an obviousness determination. Gambro Lundia AB v. Baxter Healthcare Corp., 110 F.3d 1573, 42 U.S.P.Q.2d 1378 (Fed. Cir. 1997).

One of ordinary skill in the art would not be motivated to combine such bridges 15 as shown in Figures 1, 2 and 3 of Rizzardi '951 to the structure in Bowes, et al. '369 since the disclosed structures are so completely different. Bowes, et al. '369 shows a plunger 26, the comparable plunger being element 8 in Rizzardi Figure 1. There is no teaching in the plunger of Rizzardi element 8 to provide "apertures" around the upper edge that would allow liquid to flow

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through once the plunger was initiated and activating the bottom of the container. The Examiner's combination is classic hindsight. Therefore, there is no teaching in Rizzardi '951 to arrive at applicant's claimed invention. The Examiner's rejection is incorrect and should be reversed.

Fourth Ground of Rejection

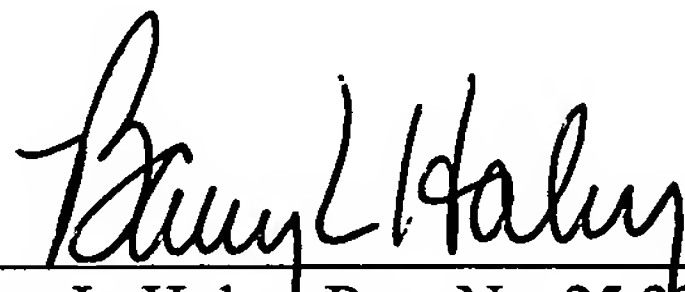
The Examiner's rejection of claim 6 under 35 U.S.C. 103(a) as unpatentable over the references applied to claim 1 and further in view of Pittman (6,053,314) is erroneous. Applicant's claim 6 includes all the limitations of claim 1 which has been discussed above. This rejection is again a classic example of Examiner hindsight. The only way a person of ordinary skill in the art would be motivated to combine the teachings of Pittman with the other references cited above is by using applicant's specification and disclosure to suggest some sort of combination. The fact is that Pittman '314 discloses a receptacle for liquid medical waste having nothing to do with the capsule claimed by applicant in claim 1 and claim 6 for dispensing a liquid or powder into another container. Applicant's claim 6 requires that "said second member has a hole in said closed end and removable sealing means covering said hole." Pittman '314 as such is not analogous art. The structure and function of the references cited are very different. There is no suggestion or teaching in the references as a whole that would suggest the combination cited by the Examiner. Would a person put a straw hole in a medical waste container in order to insert a straw for drinking? The Examiner states Pittman shows a lid having a hole with a removable sealing means. In Figure 10 of applicant's drawings, the plunger 200 includes an

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aperture 122 that allows liquid to flow through the device or the admission of a straw or for pouring liquid from the container once the plunger is activated. There is absolutely no teaching or suggestion in Pittman '314, especially when viewed with all the other references cited by the Examiner, to arrive at the claimed combination. The Examiner's rejection of claim 6 is totally based on hindsight and should be reversed.

If there are any additional charges, including extension of time, please bill our Deposit Account No. 13-1130.

Respectfully submitted,



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CLAIMS APPENDIX

1. A capsule that contains liquid and/or dry material to be subsequently dispensed into a container comprising:

a capsule body that is impervious to liquid;

said capsule body, including a first member and a second member, said second member mountable in said first member;

said capsule first member body having a top opening and a sealed closed bottom;

said capsule second member having a sealed closed top and an open bottom and a cutting element defining the open bottom, said cutting element further including a first prong and a second prong disposed along the peripheral edge of the second member bottom and having a cutting edge disposed between said first prong and said second prong, said first prong and said second prong being disposed below an opposite bottom edge and forming the lower portion of said bottom edge whereby said first member can be moved relative to said second member such that the second member will cut open the sealed closed bottom of said first member; and

said first and second members in a first mode are sealed forming said capsule body preventing any liquid or dry material from escaping from the capsule body.

2. A capsule as in claim 1, wherein:

said first member is cylindrical and said second member is cylindrical; and

the inside diameter of said first member being larger than the outside diameter of the said second member.

3. A capsule as in claim 2, wherein:

said first member sealed bottom has an area of weakened material around its periphery, for rupture by said second member.

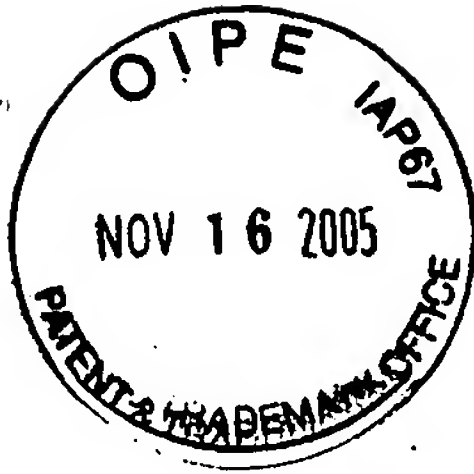
4. A capsule as in claim 2, wherein:
said first member inside wall has a sealing means that engages said second member.
5. A capsule as in claim 1, wherein:
said first member has a peripheral lip with apertures that extends radially outward from said first member top opening.
6. A capsule as in claim 1, wherein:
said second member has a hole in said closed end and removable sealing means covering said hole.

EVIDENCE APPENDIX

None.

RELATED PROCEEDINGS APPENDIX

None.



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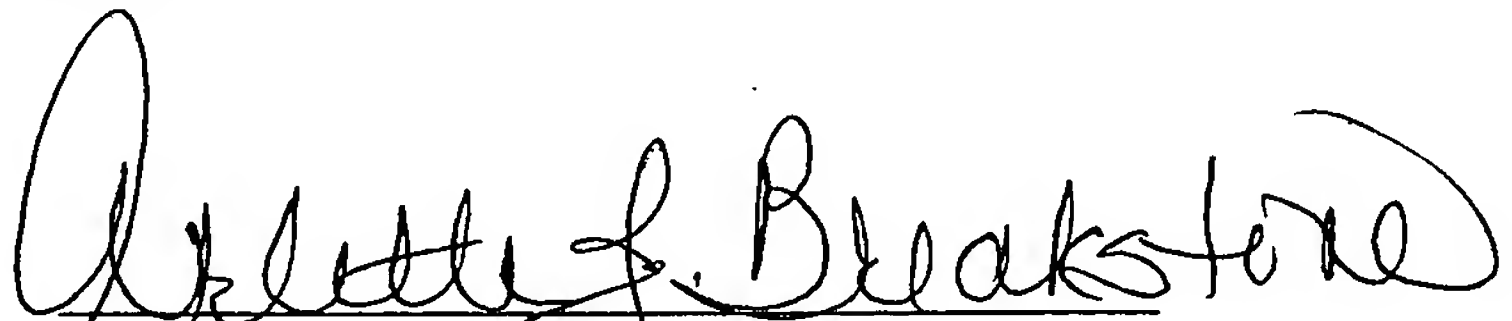
APB ZFW

CERTIFICATE OF EXPRESS MAIL

I HEREBY CERTIFY that the following correspondence; Appeal Brief (in Triplicate); a Check in the Amount of \$250.00 for the required fee; and a Return Postcard for confirmation of receipt, is being deposited with the United States Postal Service as Express Mail No. EV 720779244 US, addressed to: Mail Stop Appeal Brief-Patents, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450, on this 16th day of November, 2005.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Any additional charges, including extension of time, please bill our Account No. 13-1130.


Arlette J. Breakstone / Paralegal

Date: November 16, 2005

Customer No. 22235

MALIN, HALEY & DiMAGGIO, P.A.